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In the Supreme Court of the United States

OCTOBER TERM, 1986

EASTERN CONNECTICUT CITIZENS ACTION GROUP, INC., ET AL., PETITIONERS

v.

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioners contend that the courts below erred in dismissing their claims on ripeness grounds.

1. Petitioners are two environmental organizations and 38 individuals who claim to own property that will be taken or diminished in value as a result of the construction of a proposed four-lane expressway, known as "Relocated Route 6," between the Connecticut towns of Bolton and Windham (Pet. App. 4a). While Relocated Route 6 has a complex procedural history (see generally *National Wildlife Federation* v. *Goldschmidt,* 504 F. Supp. 314 (D. Conn. 1980), aff'd, 677 F.2d 259 (2d Cir. 1982)), the Department of Transportation has now approved a final environmental impact statement and environmental assessment for the project pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*, and 23 C.F.R. Pt. 771 (see Pet. App. 6a). Construction of the highway cannot begin,

however, unless and until the United States Army Corps of Engineers grants Connecticut a permit, pursuant to 33 U.S.C. (& Supp. III) 1344, authorizing the filling of wetlands, and unless the Connecticut Department of Environmental Protection issues state transportation authorities a water quality certification and an inland wetlands permit (see Pet. App. 7a).

Although federal and state officials have not yet given final approval to the Relocated Route 6 project, petitioners brought this action in United States District Court for the District of Connecticut to enjoin construction of the highway. They contended in relevant part that respondents, officials of the United States and Connecticut Departments of Transportation, failed to comply with NEPA in designing and approving the construction of Relocated Route 6. See Pet. App. 4a.

The district court dismissed petitioners' claim on ripeness grounds. The court noted that Section 10(c) of the Administrative Procedure Act, recodified at 5 U.S.C. 704, permits judicial review only of "final agency action." Determining whether that requirement is satisfied, the court continued, turns on an " 'evaluat[ion] both [of] the fitness of the [agency decisions] for judicial decision and [of] the hardship to the parties of withholding court consideration.' " Pet. App. 5a (quoting *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148-149 (1967)).

Here, the court found it "evident that the environmental impact statement and environmental assessment may have to be revised, or that the plans for the highway may have to be altered or even abandoned, as a result of the evaluations that still must be undertaken by the Corps of Engineers and the [Connecticut] Department of Environmental Protection" (Pet. App. 7a-8a). In these circumstances, the court concluded "that the issues raised by [petitioners] are not yet fit for judicial decision" (*id.* at 8a).

Conversely, the court noted that its refusal to consider petitioners' claims now will not affect the environment,

since construction cannot begin until further agency action is taken (Pet. App. 9a). And while the court recognized that the individual petitioners might be discomfitted by the acquisition of their property through Connecticut's exercise of its eminent domain power, the district judge explained that petitioners will be paid just compensation for that property and may be able to reacquire the property if construction ultimately is not approved (*id.* at 9a & n.3). The court therefore held that whatever "hardships may be suffered by [petitioners] are substantially outweighed by the benefits that may be gained by deferring judicial review until the administrative decision to build the proposed highway becomes truly 'final' " (*id.* at 9a). The court dismissed petitioners' claims "without prejudice to renewal upon the completion of [final] administrative action" (*id.* at 10a; see *id.* at 7a n.2).

The court of appeals affirmed by order "for substantially the reason stated" by the district court. The court of appeals also noted that its decision "is without prejudice to whatever rights plaintiffs may have in state court to challenge under state law the State of Connecticut's acquisition of property in connection with a proposed highway project." Pet. App. 2a.

2. The fact-bound decisions below are correct and do not warrant this Court's consideration. As this Court has explained:

> The basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements * * *." In *Abbott Laboratories,* which remains our leading discussion of the doctrine, we indicated that the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration."

Pacific Gas & Electric Co. v. *Energy Resources Comm'n,*

461 U.S. 190, 200-201 (1983) (quoting *Abbott Laboratories,* 387 U.S. at 148-149). In this case, it is undisputed that both federal and state authorities must make additional environmental assessments before construction may begin on the Relocated Route 6 project. On such a record, the courts below plainly were correct in holding that the issues here are unfit for judicial review, and that postponing consideration of petitioners' claims will not cause undue hardship. As the court of appeals put it in dismissing an earlier challenge to the construction of Relocated Route 6, "[a] decision * * * at this stage would resolve a dispute about a hypothetical highway. Courts have no business adjudicating the legality of non-events." *National Wildlife Federation,* 677 F.2d at 263.

Petitioners' contention that the decision below conflicts with the holdings of this or other courts also is without merit. In *Aberdeen & Rockfish R.R.* v. *SCRAP,* 422 U.S. 289 (1975), for example (relied on by petitioners at Pet. 5-6), the Court reviewed the Interstate Commerce Commission's evaluation of the environmental impact of proposed railroad freight rates; although the rates were subject to further Commission review, their environmental impact was not. See 422 U.S. at 316-319. Petitioners' selective quotation from the Court's opinion in *SCRAP*—" 'notions of finality and exhaustion do not stand in the way of judicial review' " (Pet. 5 (quoting 422 U.S. at 319))—thus distorts the Court's meaning. The quoted phrase is preceded in the Court's opinion by the statement: "When agency or departmental consideration of environmental factors in connection with that 'federal action' is complete." Here, of course, agency consideration of environmental factors is far from complete.

The other decisions cited by petitioners also are inapposite. *National Wildlife Federation* v. *Snow,* 561 F.2d 227 (D.C. Cir. 1976) (cited at Pet. 6-7), did not involve an attempt to enjoin construction of a particular project; it

concerned, instead, a purely legal challenge to a regulation governing the conduct of public hearings. See 561 F.2d at 236. *Arlington Coalition on Transportation* v. *Volpe,* 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972); *Steubing* v. *Brinegar,* 511 F.2d 489 (2d Cir. 1975); *Environmental Defense Fund* v. *TVA,* 468 F.2d 1164 (6th Cir. 1972); and *Lathan* v. *Volpe,* 455 F.2d 1111 (9th Cir. 1971) (cited at Pet. 7), stand only for the proposition that projects may not commence or continue when *no* environmental impact statement has been prepared. And none of the other decisions cited by petitioner suggests that judicial review is appropriate when agency consideration of the environmental effects of a project is still underway.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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